

**United States Department of Labor
Employees' Compensation Appeals Board**

K.C., Appellant

and

**SECURITIES & EXCHANGE COMMISSION,
BENEFITS BRANCH, Washington, DC,
Employer**

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**Docket No. 15-1086
Issued: August 24, 2015**

Appearances:

*Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 8, 2015 appellant, through counsel, filed a timely appeal from an October 23, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

FACTUAL HISTORY

This matter has previously been before the Board on three appeals. In December 2007, OWCP accepted that appellant, then a 49-year-old securities compliance examiner, sustained

¹ 5 U.S.C. §§ 8101-8193.

thoracic and lumbosacral neuritis or radiculitis due to lifting heavy boxes containing documents.² Appellant filed claims for wage loss for intermittent periods beginning November 29, 2005. On January 20, 2006 she underwent computerized tomography testing of her right ribs, which revealed nondisplaced fractures of the 10 and 11 ribs. A magnetic resonance imaging (MRI) scan performed on February 2, 2006 showed findings of right-sided small extruded T6-7 disc herniation, small central T7-8 disc herniation, and left-sided T8-9 disc herniation. An MRI scan of the lumbosacral spine from this period revealed L3-4 and L4-5 disc bulges.

On February 21, 2007 appellant was examined by Dr. Nancy E. Epstein, an attending Board-certified neurosurgeon, who noted that she developed intermittent exacerbations and remissions of symptoms due to lifting boxes. The record contains medical reports dated March 23 and June 12, 2007 from Dr. Philippe Vaillancourt, an attending Board-certified pain management physician, who described the pain management treatment he provided and noted that appellant required a modified work schedule for approximately six weeks.

OWCP referred appellant for additional evaluation by Dr. Edward M. Weiland, a Board-certified neurologist and second opinion physician. On March 28, 2008 Dr. Weiland reported that the causal relationship between appellant's rib fractures and employment factors could not be clearly identified. He concluded that she was not disabled from a neurological standpoint and found that there was no reason she could not return to her regular job for the employing establishment without restrictions.

In order to resolve the conflict in medical opinion evidence regarding the nature and extent of her disability, appellant was referred to Dr. William Healy, a Board-certified orthopedic surgeon, for an impartial medical examination. In an August 14, 2008 report, Dr. Healy opined that her mid and low back pain and degenerative disc disease might have been aggravated by lifting at work. He stated that he could not relate appellant's rib fractures to her employment factors as the forces required to cause a rib fracture would have been much more significant than those she experienced at work. Dr. Healy opined that he could not presently find any evidence of thoracic or lumbosacral neuritis or radiculitis. He felt that there were findings of degenerative disc disease and herniation in the thoracic and lumbar spine that was aggravated by lifting at work. Dr. Healy indicated that appellant could return to some kind of light-duty work.

OWCP, in a June 25, 2009 decision, denied appellant's claim that she had disability on or after November 29, 2005 due to her accepted work injuries. It indicated that the weight of the medical evidence with respect to this matter rested with the August 14, 2008 report of Dr. Healy. However, as a result of Dr. Healy's report, OWCP expanded appellant's accepted conditions to include aggravation of degenerative thoracic disc disease, aggravation of degenerative lumbar disc disease, aggravation of herniated lumbar disc, and aggravation of herniated thoracic disc.

In an August 27, 2010 decision, OWCP affirmed its June 25, 2009 decision, finding that the weight of the medical evidence regarding work-related disability continued to rest with the opinion of Dr. Healy.

² Appellant indicated that she had to move a large number of boxes and sort through many files beginning in late 2004 when she started working on a large case in conjunction with the U.S. Department of Justice. She first became aware of her claimed condition and its relation to work factors in November 2005.

The Board, in a September 8, 2011 decision,³ set aside OWCP's August 27, 2010 decision and remanded the case to OWCP for further development. The Board found that, in his August 14, 2008 report, Dr. Healy did not provide a clear opinion regarding whether appellant's work-related conditions caused disability for any period on or after November 29, 2005. The Board determined that the opinion of Dr. Healy required clarification regarding her work-related disability on or after November 29, 2005 and it remanded the case to OWCP for further development.

On remand, OWCP requested that Dr. Healy provide a supplemental report regarding whether appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. In a November 28, 2011 report, Dr. Healy diagnosed cervical spondylosis, degenerative disc disease of the thoracic spine, degenerative disc disease lumbar spine, fibromyalgia, and fracture of the right foot.⁴ Regarding appellant's periods of disability, he noted that appellant had a work-related temporary disability secondary to a November 2005 accident and stated, "I felt the patient had preexistent degenerative process that was aggravated by the November 29, 2005 incident. The patient at the time of my examination today admits to having prior complaints. I do believe that that aggravation was temporary. I do believe she got back to her baseline."

In a December 23, 2011 decision, OWCP found that appellant did not meet her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It found that the November 28, 2011 report of Dr. Healy did not show that appellant had such disability.

The Board, in a May 2, 2013 decision,⁵ set aside OWCP's December 23, 2011 decision and remanded the case to OWCP for further development of the medical evidence. The Board noted that Dr. Healy's November 28, 2011 supplemental report suggested that appellant did sustain periods of work-related disability beginning sometime around November 2005, but that he did not provide a full description of her specific periods of work-related disability. The Board found that his opinion was insufficient to resolve the existing conflict in the medical opinion evidence and directed OWCP to refer appellant, along with the case record and a detailed statement of accepted facts, to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue of whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

On remand, OWCP referred appellant and the case record to Dr. Ronald A. Ripps, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It provided Dr. Ripps with a document which indicated that the purpose of his evaluation was to resolve a conflict in the medical opinion evidence regarding whether

³ Docket No. 11-225 (issued September 8, 2011).

⁴ The record reflects that appellant sustained a right foot fracture due to a nonwork-related fall in September or October 2011.

⁵ Docket No. 12-1386 (issued May 2, 2013).

appellant experienced intermittent periods of disability on and after November 29, 2005 and whether she had been totally disabled since August 29, 2008. The document stated:

“The accepted conditions in the claim are thoracic and lumbosacral/neuritis/radiculitis.

“Did [appellant] sustain rib fractures as a result of lifting boxes from the floor to the desk and carrying those boxes to other locations? If so, explain how this caused the rib fractures. If not explain why this did not cause the rib fractures.

“During [September 2011 appellant] fell and fractured her foot. Did the lifting and carrying of the boxes cause or aggravate any other medical conditions including cervical spondylosis, degenerative disc disease of the thoracic spine, degenerative disc disease of the lumbar spine, and fibromyalgia. Explain why any medical conditions found were or were not caused or aggravated by the lifting and carrying of the boxes.”⁶

In a July 10, 2013 report, Dr. Ripps discussed some of the medical evidence of record and reported findings on physical examination. He reported that appellant had tenderness in her left trapezius, parascapular musculature, both sacroiliac joints, and thoracolumbar junction and diagnosed fractured ribs by history, fibromyalgia, symptom magnification, and depression. Dr. Ripps indicated that OWCP had noted that the “accepted conditions in the claim are thoracic and lumbosacral/neuritis/radiculitis.” With regard to these conditions, he stated, “This was not supported by the medical documentation that you had me review. [Appellant] was examined by a number of neurosurgeons and neurologists, none of whom ever found evidence of neurologic disease or spine pathology.... There was no objective evidence that work activity around [November 29, 2005] in any way ‘aggravated’ degenerative disc disease.” With respect to the question of whether the lifting and carrying of boxes caused or aggravated any other medical conditions, Dr. Ripps noted, “No, repetitive lifting and carrying of 20[-]pound boxes is not a risk factor for cervical spondylosis, degenerative disc disease of the thoracic spine or degenerative disc disease of lumbar spine.” He concluded that appellant did not have any disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

In a September 4, 2013 decision, OWCP found that appellant did not meet her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It found that the weight of the medical evidence rested with the opinion of Dr. Ripps.

The Board, in an August 8, 2014 decision,⁷ set aside OWCP’s September 4, 2013 decision and remanded the case to OWCP for further development of the medical evidence. The Board noted that Dr. Ripps was not provided a detailed statement of accepted facts that included all of appellant’s accepted work injuries and that Dr. Ripps made statements that were not in

⁶ It does not appear that Dr. Ripps was provided with a detailed statement of accepted facts.

⁷ Docket No. 14-791 (issued August 8, 2014).

accordance with accepted facts in the case.⁸ Dr. Ripps' July 10, 2013 report was not sufficiently well rationalized to constitute the weight of the medical evidence regarding appellant's disability claim. On remand, the case record, a detailed statement of accepted facts, and, if necessary, appellant, were to be referred to Dr. Ripps for a supplemental report regarding whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

On remand, OWCP requested, in an August 21, 2014 letter, that Dr. Ripps provide a supplemental report to clarify his July 10, 2013 report. It provided him with a statement of accepted facts containing a complete list of appellant's accepted conditions and a description of the definition under FECA of temporary and permanent aggravations of underlying medical conditions. The document stated:

"You stated in your report that there was no objective medical evidence to establish that [appellant's] work activity aggravated her degenerative disc disease. Considering the definitions of causal relationship provided were the aggravations of her spinal conditions causally related to carrying boxes? Why or why not?

"Is there objective evidence that [appellant] was disabled for intermittent periods on or after [November 29, 2005]? If so, identify the objective evidence establishing that she was disabled for intermittent periods on or after [November 29, 2005]."

In a September 3, 2014 report, Dr. Ripps responded to OWCP's request for clarification. He stated that he had reviewed the new statement of accepted facts, but that it did not change the opinions or conclusions expressed in his July 10, 2013 report. Dr. Ripps noted that an aggravation could be temporary or permanent and stated that in his July 10, 2013 report he had indicated that there was no evidence of a permanent aggravation of appellant's degenerative disc disease. With respect to the question of disability on or after November 29, 2005, he asserted that this question was addressed in his July 10, 2013 report and stated, "I acknowledged that [appellant] did have intermittent periods of disability and that she resigned from work on [August 29, 2008]. I did not think that her disability or her resignation were work related, but may have been related to her degenerative disc disease."⁹ Dr. Ripps stated:

"You have then posed the question that if it is accepted that in fact there was a permanent aggravation of [appellant's] degenerative disc disease, would such an aggravation have been causally related to her lifting boxes?¹⁰ In light of the fact [appellant] did not seek medical attention until a year after the alleged work

⁸ The Board found, "Dr. Ripps specifically denied that appellant sustained work-related thoracic and lumbosacral neuritis or radiculitis. Dr. Ripps also denied the possibility that she sustained a work-related aggravation of degenerative disc disease of the thoracic or lumbosacral spine."

⁹ Dr. Ripps commented, "I also commented that the true extent of [appellant's] disability could never be accurately assessed until she was detoxified. When I examined her she had been on morphine for five years and appeared to be overmedicated."

¹⁰ The Board finds that OWCP did not, in fact, pose such a question in its August 21, 2014 letter.

incident, it is highly unlikely that there is a causal relationship. As I mentioned in my [i]ndependent [m]edical [e]xamination, for a causal relationship to exist, there has to be an appropriate mechanism of injury, a demonstrable tissue loss, and a plausible relationship between the two. For reasons discussed in the [i]ndependent [m]edical [e]xamination, all these elements are lacking in [appellant's] case.”

In an October 23, 2014 decision, OWCP relied upon the latest opinion of Dr. Ripps to deny appellant's claim as she had not met her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries as the weight of the medical opinion evidence on this matter rested with the opinion of Dr. Ripps.

LEGAL PRECEDENT

In a situation where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion.¹¹ If the impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, it must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.¹²

ANALYSIS

OWCP initially accepted that appellant sustained thoracic and lumbosacral neuritis or radiculitis due to lifting heavy boxes containing documents.¹³ After development of the medical evidence, it expanded her accepted conditions to include aggravation of degenerative thoracic disc disease, aggravation of degenerative lumbar disc disease, aggravation of herniated lumbar disc, and aggravation of herniated thoracic disc. Appellant filed claims for wage loss for intermittent periods beginning November 29, 2005.

OWCP engaged in extensive development of the medical evidence in order to determine whether appellant established that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It referred her to Dr. Ripps, a Board-certified orthopedic surgeon who served as an impartial medical specialist. Dr. Ripps produced a report dated July 10, 2013. In an August 8, 2014 decision,¹⁴ the Board remanded the case to OWCP for further development of the medical evidence noting that the July 10, 2013 report of Dr. Ripps was not sufficiently rationalized to constitute the weight of the medical evidence regarding appellant's disability claim. The Board indicated that Dr. Ripps made statements in

¹¹ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

¹² *Harold Travis*, 30 ECAB 1071, 1078 (1979).

¹³ Appellant first became aware of her claimed condition and its relation to work factors in November 2005.

¹⁴ Docket No. 14-791 (issued August 8, 2014).

his July 10, 2013 report that were not in accordance with the accepted facts in the case and that he did not provide a clear opinion on disability.¹⁵

The Board finds that the September 3, 2014 supplemental report of Dr. Ripps did not adequately address the concerns raised by the Board in its August 8, 2014 decision regarding the content of his July 10, 2013 report with respect to the relevant issue of this case. In essence, the September 3, 2014 report of Dr. Ripps merely repeats the statements contained in his July 10, 2013 report without providing further clarification. Moreover, although Dr. Ripps was provided with a new statement of accepted facts that included all of appellant's accepted conditions, it remains unclear from his September 3, 2014 letter whether he acknowledges that appellant sustained all of the conditions accepted by OWCP, including aggravation of degenerative thoracic disc disease, aggravation of degenerative lumbar disc disease, aggravation of herniated lumbar disc, and aggravation of herniated thoracic disc. This is critical in light of the fact that he specifically denied the existence of work-related thoracic and lumbosacral neuritis or radiculitis in his July 10, 2013 initial impartial medical examination report. Dr. Ripps did not provide a clear opinion on any possible periods of work-related disability.¹⁶

For the above-described reasons it is found that the opinion of Dr. Ripps is not sufficiently well rationalized to constitute the weight of the medical opinion evidence regarding whether appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. The Board has held that if the impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to another impartial medical specialist for the purpose of obtaining his or her rationalized medical opinion on the issue.¹⁷ Therefore, the case shall be referred to another impartial medical specialist for the purpose of obtaining his or her rationalized medical opinion regarding whether appellant had work-related disability on or after November 29, 2005. After carrying out this necessary development, OWCP shall issue an appropriate decision regarding appellant's claim for work-related disability on or after November 29, 2005.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

¹⁵ The Board found, "Dr. Ripps specifically denied that appellant sustained work-related thoracic and lumbosacral neuritis or radiculitis. Dr. Ripps also denied the possibility that she sustained a work-related aggravation of degenerative disc disease of the thoracic or lumbosacral spine."

¹⁶ Dr. Ripps indicated that appellant did not have a "permanent" aggravation of degenerative disc disease, but he did not clarify whether he acknowledges that appellant did in fact have aggravation of degenerative disc disease, as accepted by OWCP, and whether appellant's accepted conditions caused disability for any period. He generally provided a speculative and equivocal opinion that appellant might have had disability on or after November 29, 2005 which "may have been related to her degenerative disc disease."

¹⁷ See *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: August 24, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board